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18		
19	UNITED STATES I	DISTRICT COURT
20	NORTHERN DISTRIC	CT OF CALIFORNIA
21	SAN FRANCISCO DIVISION	
22	CHARDANT HEALTH DIC	L G N 17 02500 IGG
23	GUARDANT HEALTH, INC.,	Case No.: 17-cv-03590-JSC
24	Plaintiff/Counter-defendant,	REDACTED VERSION OF ROPES & GRAY LLP AND FOUNDATION
25	V.	MEDICINE INC.'S OPPOSITION TO
- 1		GUARDANT HEALTH, INC.'S MOTION TO DISQUALIFY ROPES &
26	FOUNDATION MEDICINE, INC.,	GRAY LLP AS COUNSEL FOR FOUNDATION MEDICINE, INC.
27 28	Defendant/Counterclaimant.	Hon. Jacqueline Scott Corley

ROPES & GRAY LLP AND DEFENDANT FOUNDATION MEDICINE INC.S OPPOSITION TO PLAINTIFF GUARDANT HEALTH, INC.'S MOTION TO DISQUALIFY ROPES & GRAY LLP AS COUNSEL FOR DEFENDANT FOUNDATION MEDICINE, INC.

I. INTR	ODUCTION
II. FACT	TUAL BACKGROUND
A.	
Α.	
_	
В.	
C.	
D.	On March 7, 2017 Ropes Announced Its Intention To Transfer Its Patent Prosecution Business To Another Firm, Triggering A Flurry Of Media Reporting On The Subject
E.	
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F.	On June 30, 2017, FMI Retained Ropes To Handle The Instant Matter And In Connection With That Retention Ropes Erected An Ethical Wall Safeguarding Guardant's Information And Has Abided By It
G.	On August 1, 2017, Mr. Haley Left Ropes To Form His Own Firm
Н.	On September 12, 2017, Guardant Filed This Motion To Disqualify Ropes Simultaneously With Its Motion For Preliminary Injunction In An Attempt To Prejudice FMI's Interests.
III. LEG <i>A</i>	AL STANDARD
IV. ARG	UMENT
A.	Guardant Was Not A Current Client When FMI Engaged Ropes To Represent It In This Case
	1.
	2.
В.	Guardant's "Reasonably Objective Expectation" Has No Bearing On Whether Guardant Was A Client Of Ropes On June 30, 2017, But Even If It Did, Guardant Could Not Have Had Such An Expectation

# Case 3:17-cv-03590-JSC Document 56 Filed 09/29/17 Page 3 of 28

1	C.	There Is No Substantial Relationship Between Ropes' Work For Guardant And This False Advertising Case Because Ropes Did Not Receive Any "Material"
2		Guardant Information
3 4	D.	Guardant's Disqualification Motion Is Tactically Based And, If Granted, Would Severely Prejudice FMI's Interests
5	V. Concl	usion
$\begin{bmatrix} 5 \\ 6 \end{bmatrix}$		
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1	TABLE OF AUTHORITIES
2	Page(s)
3	Federal Cases
5	Beltran v. Avon Prods., Inc., 867 F. Supp. 2d 1068 (C.D. Cal. 2012)
6 7	California Earthquake Auth. v. Metro. W. Sec., LLC, 712 F. Supp. 2d 1124 (E.D. Cal. 2010)
8 9	Corns v. Laborers Int'l Union of N. Am., No. 09-CV-4403 YGR, 2014 WL 1319306 (N.D. Cal. Mar. 31, 2014)
10	Glaxo Grp. Ltd. v. Genentech, Inc., No. SA 10-CV-2764-MRP, 2010 WL 11074653 (C.D. Cal. June 15, 2010)
11 12	IPVX Patent Holdings, Inc. v. 8x8, Inc., No. 413CV01707SBAKAW, 2013 WL 6700303 (N.D. Cal. Dec. 19, 2013)
13 14	Kelly v. Roker, No. C 11-05822 JSW, 2012 WL 851558 (N.D. Cal. Mar. 13, 2012)21
15 16	LeapFrog Enterprises, Inc. v. Epik Learning, LLC, No. 16-CV-04269-EDL, 2017 WL 2986604 (N.D. Cal. Feb. 23, 2017)
17	Love v. Permanente Med. Grp., No. 12-CV-05679-WHO, 2013 WL 5273213 (N.D. Cal. Sept. 18, 2013)
18 19	Visa U.S.A., Inc. v. First Data Corp., 241 F. Supp. 2d 1100 (N.D. Cal. 2003)
20	California Cases
21 22	Banning Ranch Conservancy v. Superior Court, 193 Cal. App. 4th 903, 123 Cal. Rptr. 3d 348 (2011)
23 24	Baugh v. Garl, 137 Cal. App. 4th 737 (2006)
25	In re Charlisse C., 45 Cal.4th 145, 84 Cal.Rptr.3d 597, 194 P.3d 330 (2008)
26 27	People ex rel. Dep't of Corps. v. SpeeDee Oil Change Sys., Inc.,         20 Cal. 4th 1135, 980 P.2d 371 (1999)
28	Farris v. Fireman's Fund Ins. Co., 119 Cal. App. 4th 671, 14 Cal. Rptr. 3d 618 (2004)
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ROPES & GRAY LLP AND DEFENDANT FOUNDATION MEDICINE INC.S OPPOSITION TO PLAINTIFF GUARDANT HEALTH, INC.'S MOTION TO DISQUALIFY ROPES & GRAY LLP AS COUNSEL FOR DEFENDANT FOUNDATION MEDICINE, INC.

# Case 3:17-cv-03590-JSC Document 56 Filed 09/29/17 Page 5 of 28

1	Fracasse v. Brent, 6 Cal. 3d 784, 494 P.2d 9 (1972)
2 3	Morrison Knudsen Corp. v. Hancock, Rothert & Bunshoft, 69 Cal.App. 4th 223
4   5	Vella v. Hudgins, 151 Cal. App. 3d 515, 198 Cal. Rptr. 725 (Ct. App. 1984)
6	Federal Statutes
7	Lanham Act
8	California Statutes
9 10	Cal. Civ. Code § 1636
11	
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# I. **INTRODUCTION** 1 Plaintiff Guardant Health, Inc.'s ("Guardant's") supposed "alarm" that Ropes & Gray 2 LLP ("Ropes") is counsel for Defendant Foundation Medicine, Inc. ("FMI") in this case is not 3 credible. 4 5 . Ropes' relationship with Guardant was 6 neither "substantial" nor "ongoing" on June 30, 2017 when Ropes was retained by FMI for this 7 case (a retention that Ropes expressly disclosed days later to Guardant's counsel). Indeed, 8 Guardant's motion is merely an improper effort to gain a tactical advantage against FMI that 9 should be denied. 10 By any objective measure, Guardant had ceased to be a Ropes client well before FMI 11 retained Ropes for this case. 12 13 14 15 Nor can there be any doubt that the conclusion of Ropes' work on these two matters 16 terminated Ropes' attorney-client relationship with Guardant. 17 18 19 20 , because on March 7, 2017, Ropes announced to 21 the world that it would soon be exiting the patent rights management business, which in fact it 2.2. did on July 31, 2017. 23 24 25 26 27 28

ROPES & GRAY LLP AND DEFENDANT FOUNDATION MEDICINE INC.S OPPOSITION TO PLAINTIFF GUARDANT HEALTH, INC.'S MOTION TO DISQUALIFY ROPES & GRAY LLP AS COUNSEL FOR DEFENDANT FOUNDATION MEDICINE, INC.

Guardant's assertion that Ropes "conveniently determined" on the eve of its retention by FMI that its representation of Guardant had ended also is demonstrably false. In May of 2017, when then-Ropes partner James F. Haley, Jr. was reaching out to current clients to ask if they wanted representation by his new firm,

Because Guardant was a former client, Ropes could only have a disqualifying conflict representing FMI against Guardant in this false advertising case if Guardant could establish with specificity that Ropes' completed work for Guardant is "substantially related" to the work it is performing for FMI in this case. In this false advertising case, the claims at issue concern how accurate the parties' cancerous tumor detection assays are, as measured and assessed in certain ways. The false advertising claims do not concern anything that could have been relevant to the work Ropes did for Guardant, namely,

are "black boxes". What matters in this case is *how the parties* advertise the results of using those black boxes. Ropes did not advise, or receive material confidential information from, Guardant concerning the issues in this case and, as such, there is no former client conflict.

. Indeed, for purposes of this case

The weakness of Guardant's conflicts arguments underscores the fact that Guardant's motion is nothing more than an improper attempt to gain a litigation advantage over FMI. Although Guardant first learned that Ropes would represent FMI in this case on July 10, 2017, it waited over two months until September 12, 2017 to file its motion to disqualify Ropes. And on the very day it moved to disqualify, Guardant also filed its motion for a preliminary injunction, requiring FMI (and its counsel) to address a critical substantive motion on an expedited basis while also defending its choice of counsel. While Guardant's motion and its September 20, 2017 letter to the Court make much of Guardant's supposed concern that FMI's Ropes lawyers could use Guardant's privileged and confidential information against it, Guardant's own actions

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make clear that concern is specious. In connection with its preliminary injunction motion Guardant advocated for, and is pursuing, a discovery schedule that necessarily will require Ropes to be heavily involved in FMI's defense of this case while this motion is under consideration. If Guardant truly thought that Ropes' presence as FMI's counsel would unfairly advantage FMI in this case, it easily could have sought a schedule that would have allowed this motion to be resolved prior to pursuing the preliminary injunction motion. But it did not choose that path.

Finally, Ropes' disqualification from this case would significantly prejudice FMI. FMI chose Ropes to defend it because of Ropes' partner Peter Brody's substantial expertise with Lanham Act cases, including, in particular, in the life sciences industry in which the parties operate. As of this filing, Mr. Brody and his team, none of whom performed any work for Guardant when it was a Ropes client, have already collectively spent over a thousand hours on the defense of FMI. A substantial amount of that time had been spent even before Guardant's motion was filed. By the time this motion is heard, far more work will have been done, and many more hours spent, by Ropes lawyers on behalf of FMI.

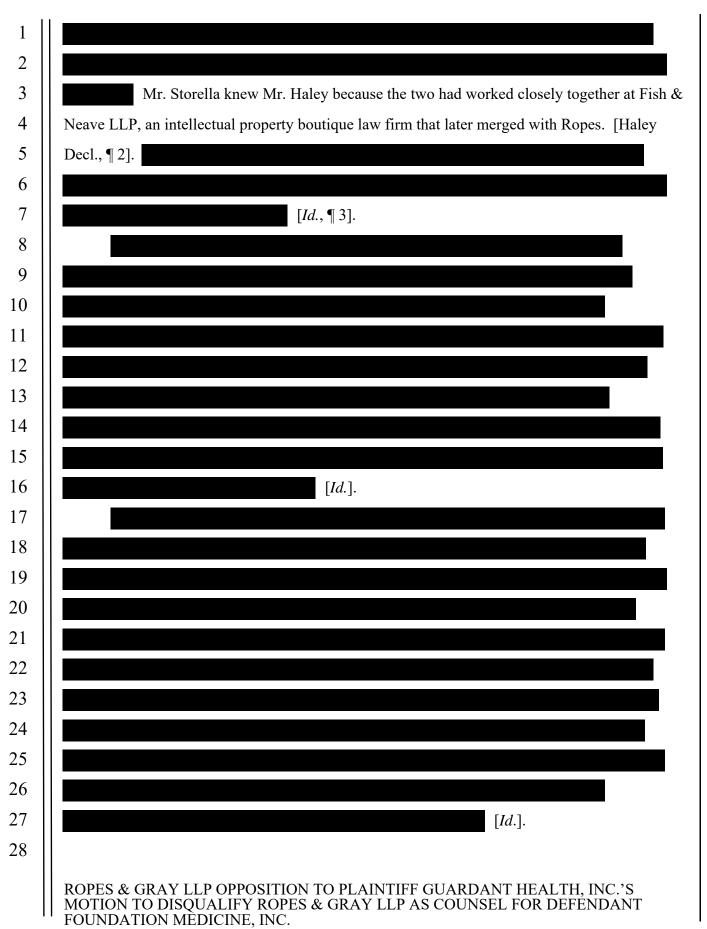
If Ropes is disqualified at this stage, FMI will be prejudiced by the need to select new counsel and get that counsel prepared to defend it while the preliminary injunction proceedings continue to move rapidly. By contrast, Guardant will suffer no prejudice if Ropes remains in the case; its confidential information is secure behind an ethical wall and none of the Ropes attorneys and Technical Advisors who worked for Guardant are still with Ropes. In practical terms, it is no different than if an entirely separate law firm were representing FMI in this case.

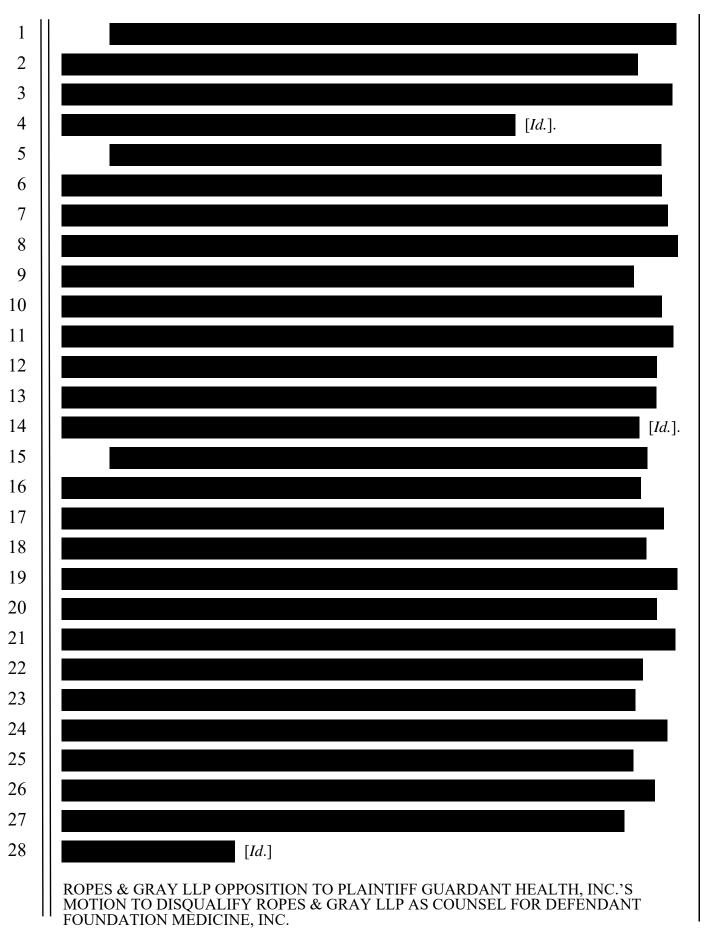
The Court should deny Guardant's motion to disqualify Ropes.

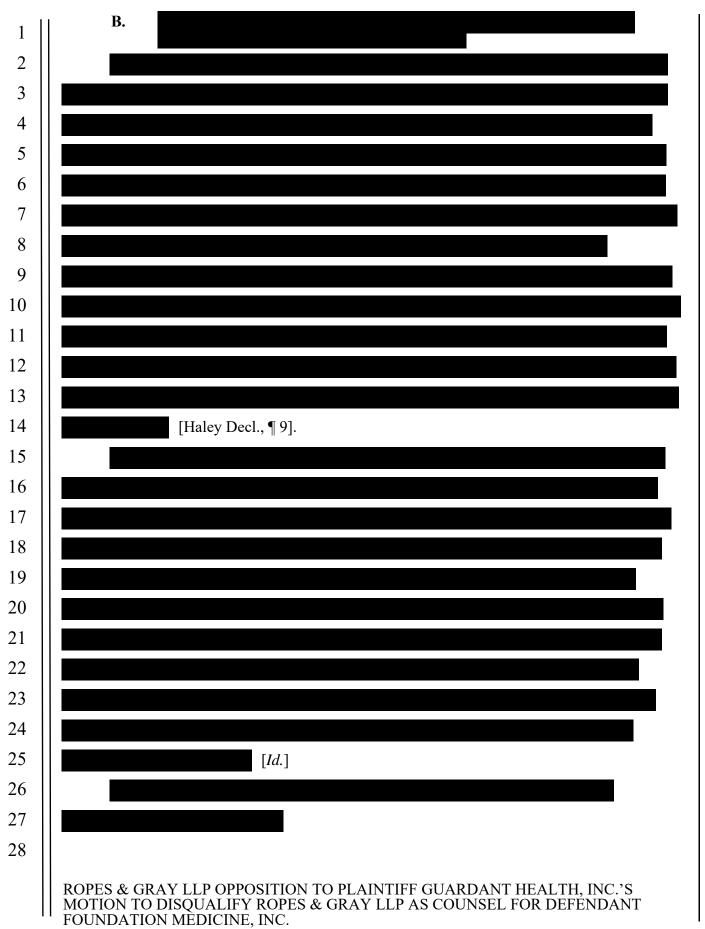
#### II. FACTUAL BACKGROUND

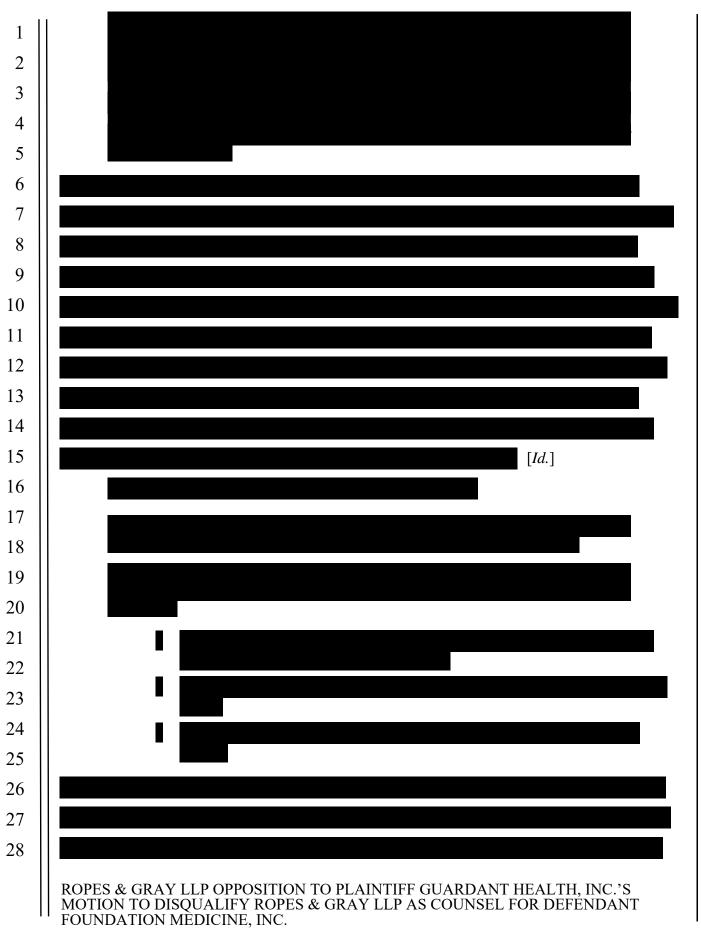
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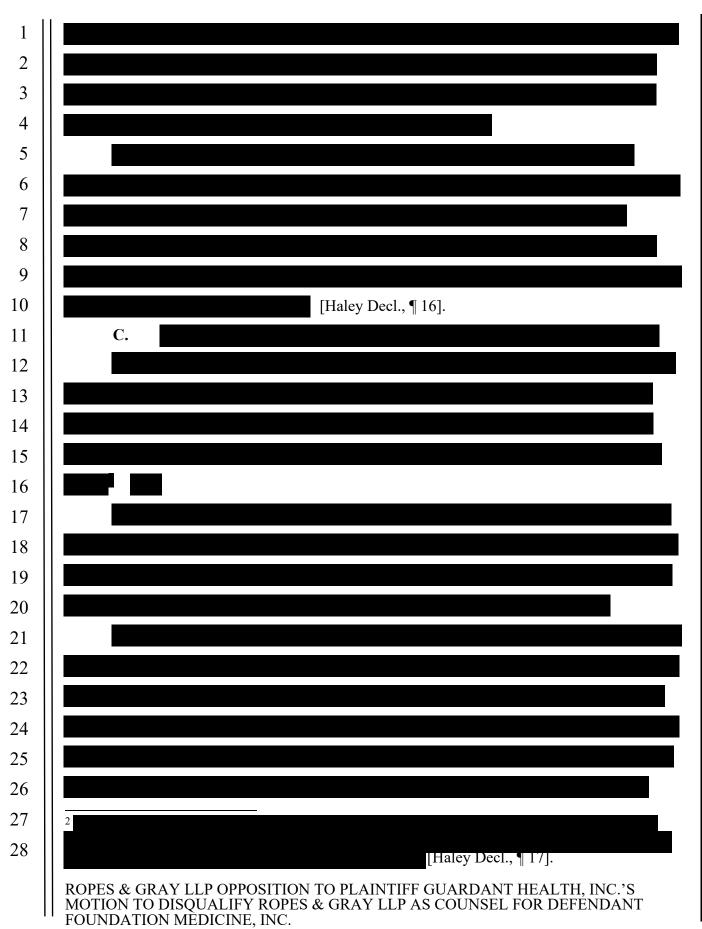
In late 2015, Guardant's counsel, John Storella of John Storella P.C., contacted Mr. Haley to see if he would be interested in assisting Guardant, together with Guardant's counsel at Wilson Sonsini Goodrich and Rosati ("Wilson Sonsini"), in

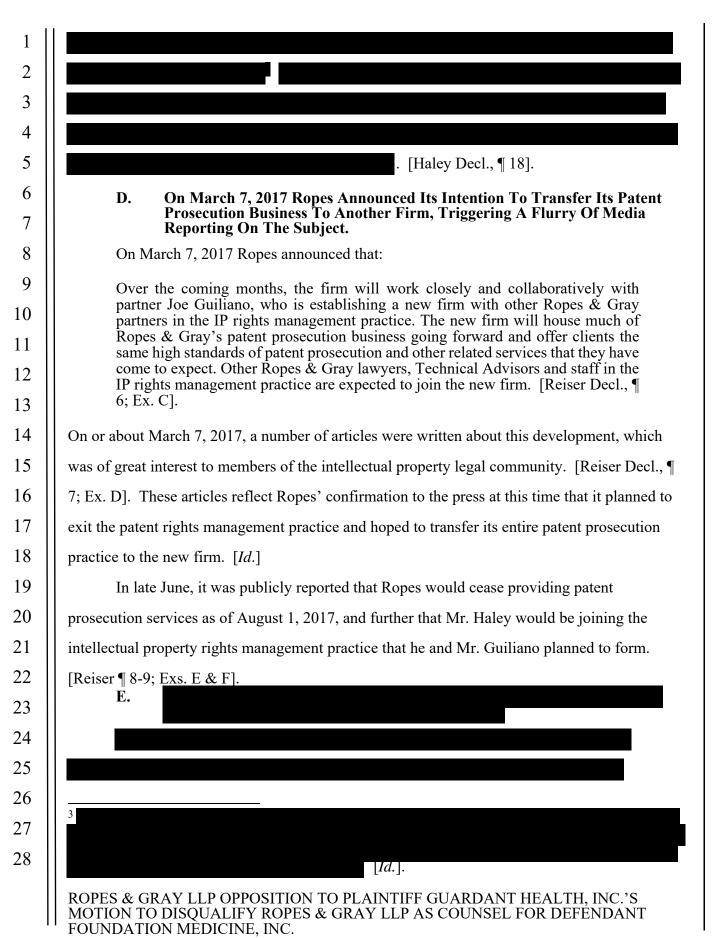


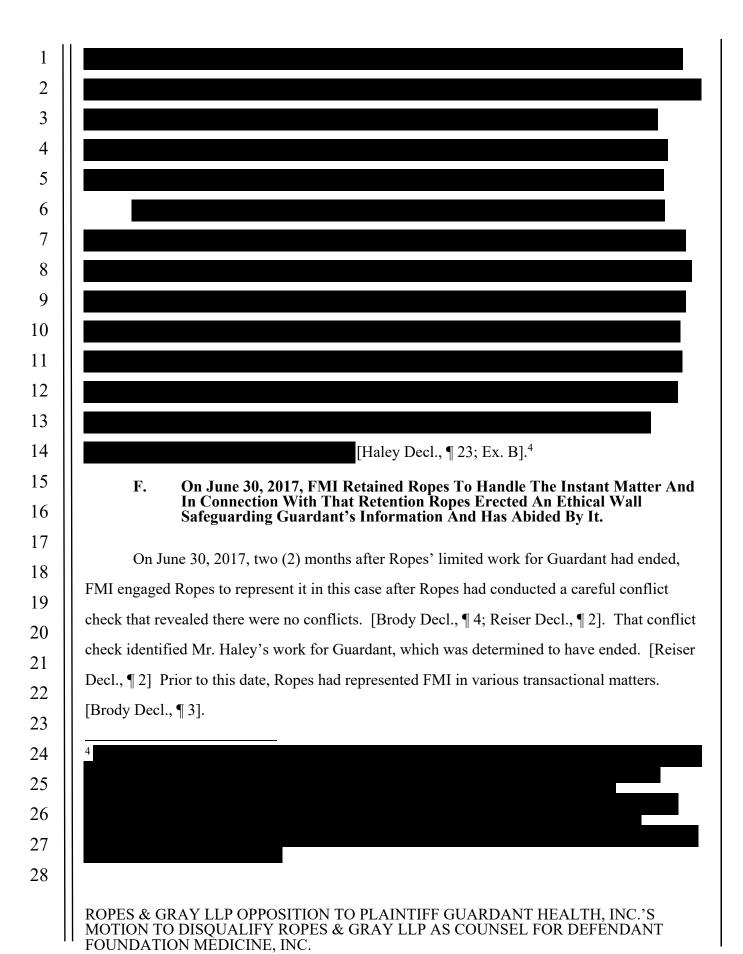












In connection with this retention, Ropes created a precautionary ethical wall pursuant to its standard practice of doing so whenever it accepts representation adverse to a former client in a litigation matter.<sup>5</sup> [Reiser Decl., ¶ 3]. Guardant's claim that the ethical wall Ropes established has been breached on the basis that Mr. Brody reviewed Mr. Storella's July 21, 2016 email is false. In fact, Mr. Brody had seen only the Engagement Letter until he received

. [Brody Decl., ¶ 5, 8].

In any event, neither the Engagement Letter nor the July 21, 2016 email contain any confidential Guardant information that is in any way related to this case, and Mr. Haley did not share with Mr. Brody or anyone representing FMI in this case any of the very limited amount of confidential information he obtained in connection with his substantive work for Guardant.<sup>6</sup> [Haley Decl., ¶ 27].

FMI hired Ropes because Mr. Brody has extensive experience handling false advertising cases under the Lanham Act, including in the life sciences sector in which this dispute arises. [Brody Decl., ¶ 3]. Mr. Brody and his team have collectively worked over a thousand hours on this case and have: (i) thoroughly investigated the claims of the Complaint, (ii) prepared a detailed Answer, (iii) drafted and filed Counterclaims, (iv) drafted and served discovery requests, (v) engaged with Guardant's counsel and FMI regarding Guardant's discovery requests, (vi) largely concluded negotiations on a protective order with Guardant's counsel, and (vii) substantially completed work on a joint case management conference statement. [Brody Decl., 16-18, 20-24]. The parties are in the midst of expedited bilateral written discovery and

<sup>&</sup>lt;sup>5</sup> Using an industry-standard ethical wall software program, Ropes has denied anyone working on the instant matter access to Guardant documents and has instructed them not to try to access those documents. [Reiser Decl., ¶ 3].

<sup>&</sup>lt;sup>6</sup> While they were both employed by Ropes, Messrs. Brody and Haley worked out of separate offices, in separate practice groups and departments: Mr. Brody is in the Intellectual Property Litigation Group of the Litigation Department, based in Ropes' D.C. office and Mr. Haley was in the Intellectual Property Rights Management Group of the Corporate Department, based in Ropes' New York office. [Brody Decl., ¶ 1; Haley Decl., ¶ 1].

ROPES & GRAY LLP OPPOSITION TO PLAINTIFF GUARDANT HEALTH, INC.'S MOTION TO DISQUALIFY ROPES & GRAY LLP AS COUNSEL FOR DEFENDANT FOUNDATION MEDICINE, INC.

are planning for depositions to take place during the last week of October (when the Court will hear this motion) and the first week of November. [Brody Decl., ¶ 22].

#### G. On August 1, 2017, Mr. Haley Left Ropes To Form His Own Firm.

In late May 2017, shortly after Mr. Haley decided he would leave Ropes to found Haley Guiliano LLP, he reached out to his current clients to inform them of that decision. [Haley Decl., ¶ 24]

. [Id.] On August 1, 2017, Mr. Haley left Ropes to form Haley Guiliano LLP. [Haley Decl. ¶ 1].

# H. On September 12, 2017, Guardant Filed This Motion To Disqualify Ropes Simultaneously With Its Motion For Preliminary Injunction In An Attempt To Prejudice FMI's Interests.

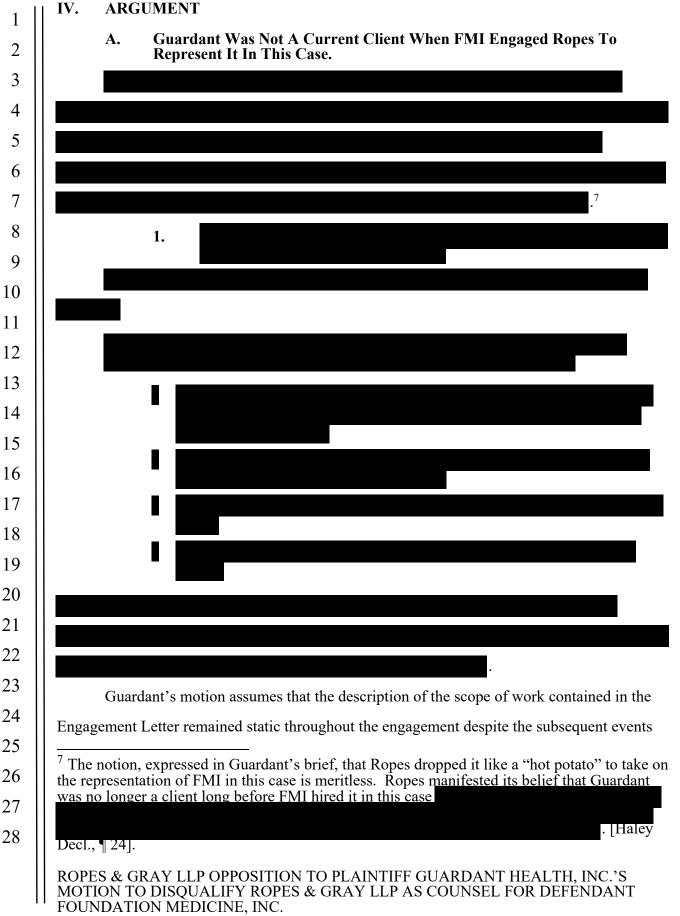
On July 10, 2017, Mr. Brody informed Guardant's counsel that Ropes would be representing FMI in this case and asked for an extension on the answer; at that time, Guardant's counsel said he would confirm whether Guardant agreed to the extension and later that day Guardant's counsel got back to Mr. Brody without mentioning any conflict. [Brody Decl., ¶ 6]. Ropes entered its appearance on July 14 and on that day conferred again with Guardant's counsel about case scheduling, but again no conflict issue was raised. [Brody Decl., ¶ 7]. Guardant did not raise the conflicts issue with Ropes until July 27, 2017 in a letter from Guardant's in-house lawyer, William Smith, to Mr. Haley. [Reiser Decl. ¶ 10, Ex. G]. And Guardant did not file this motion until September 12, 2017, the same day on which it filed its motion for a preliminary injunction. [Dkt. 32].

, and was obliged to do its utmost to remain FMI's counsel in this case because FMI was a pre-existing client, [Brody Decl. ¶ 3], and had chosen Ropes to represent it in this case.

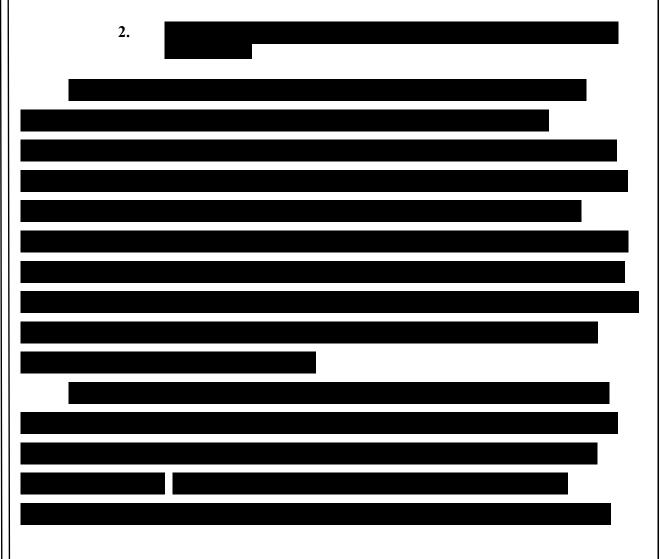
#### III. LEGAL STANDARD

"Because of their susceptibility to tactical abuse, [m]otions to disqualify counsel are strongly disfavored and should be subjected to particularly strict judicial scrutiny." *Love v. Permanente Med. Grp.*, No. 12-CV-05679-WHO, 2013 WL 5273213, at \*3 (N.D. Cal. Sept. 18, 2013) (quoting *Oracle Am., Inc. v. Innovative Tech. Distrib., LLC*, 11–CV–01043–LHK, 2011 WL 2940313, at \*4 (N.D. Cal. July 20, 2011)) (internal quotations omitted). "A motion for disqualification of counsel is a drastic measure which courts should hesitate to impose except when of absolute necessity. They are often tactically motivated; they tend to derail the efficient progress of litigation." *Visa U.S.A., Inc. v. First Data Corp.*, 241 F. Supp. 2d 1100, 1104 (N.D. Cal. 2003) (internal citations and quotations omitted).

Whether to disqualify counsel is a matter of the district court's discretion. Corns v. Laborers Int'l Union of N. Am., No. 09-CV-4403 YGR, 2014 WL 1319306, at \*2 (N.D. Cal. Mar. 31, 2014) (citing Gas-A-Tron of Ariz. v. Union Oil Co. of Calif., 534 F.2d 1322, 1325 (9th Cir. 1976)). In considering a motion to disqualify, the district court must make findings supported by substantial evidence. See Visa U.S.A., Inc. v. First Data Corp., 241 F. Supp. 2d 1100, 1104 (N.D. Cal. 2003). Because disqualification is strongly disfavored, the moving party "carries a heavy burden and must satisfy a high standard of proof." IPVX Patent Holdings, Inc. v. 8x8, Inc., No. 413CV01707SBAKAW, 2013 WL 6700303, at \*2 (N.D. Cal. Dec. 19, 2013). Courts must also be cognizant of the "substantial hardship" and the "monetary and other costs of finding a replacement" on parties whose counsel is disqualified. Love, 2013 WL 5273213, at \*3 (citing *Gregori v. Bank of Am.*, 207 Cal.App.3d 291, 300 (1989)). "Disqualification is only justified where the misconduct will have a 'continuing effect' on judicial proceedings Baugh v. Garl, 137 Cal. App. 4th 737, 744 (2006); see also People ex rel. Dep't of Corps. v. SpeeDee Oil Change Sys., Inc., 20 Cal. 4th 1135, 1145, 980 P.2d 371, 377 (1999) ("a disqualification motion may involve such considerations as a client's right to chosen counsel.").



that substantially limited that scope of work. Retainer agreements are interpreted and enforced like any other contract and are subject to the ordinary principles of contract interpretation; this means they can be modified by the subsequent agreement of the parties, as was done here. See Banning Ranch Conservancy v. Superior Court, 193 Cal. App. 4th 903, 912–13, 123 Cal. Rptr. 3d 348, 354 (2011) (holding that retainers are interpreted and enforced like any other contract). It is the scope reflected in the July 21, 2016 agreement that should control. See Cal. Civ. Code § 1636 ("A contract in writing may be modified by a contract in writing."); see also Vella v. Hudgins, 151 Cal. App. 3d 515, 519, 198 Cal. Rptr. 725, 727 (Ct. App. 1984) ("It is axiomatic that the parties to an agreement may modify it.").

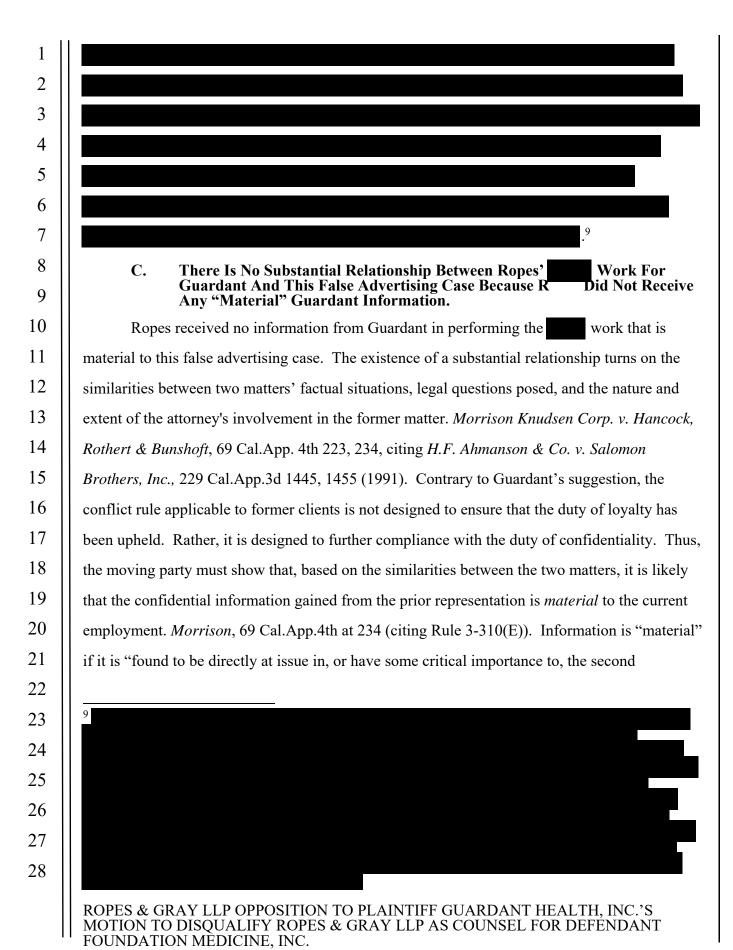


1 2 3 Guardant's "Reasonably Objective Expectation" Has No Bearing On Whether Guardant Was A Client Of Ropes On June 30, 2017, But Even If It В. 4 Did, Guardant Could Not Have Had Such An Expectation. 5 The clear and unambiguous language of the Engagement Letter's 6 obviates the need to assess whether Guardant possessed a "reasonably objective 7 expectation" that its attorney-client relationship continued through and beyond July 7, 2017. 8 "[C]ourts only look to a client's 'reasonable expectation' in situations in which there is no 9 contract." LeapFrog Enterprises, Inc. v. Epik Learning, LLC, No. 16-CV-04269-EDL, 2017 10 WL 2986604, at \*7 (N.D. Cal. Feb. 23, 2017). Guardant's reliance on Gonzalez and Beardsley 11 is misplaced as both cases are wholly inapposite to the facts at hand. Both Gonzalez and 12 Beardsley address the tolling of the statute of limitations for purposes of a malpractice suit. In 13 those cases, the main issue was the determination of the point in time at which an attorney has 14 ceased representation of a client for the purpose of tolling the statute of limitations on the 15 clients' malpractice claim, and thus neither case is applicable to the facts of this case. See 16 California Earthquake Auth. v. Metro. W. Sec., LLC, 712 F. Supp. 2d 1124, 1130 (E.D. Cal. 17 2010) (declining to extend the reasoning of legal malpractice cases to the context of concurrent 18 representation conflicts). 19 But even assuming for argument's sake that the "reasonable expectation" standard were 20 applicable here, Guardant could not have had a reasonable objective belief, on June 30, 2017, 21 that it was still a Ropes client. 22 23 24 25 26 27 28 Reiser Decl. ¶ 5 |. ROPES & GRAY LLP OPPOSITION TO PLAINTIFF GUARDANT HEALTH, INC.'S

Case No. 17-CV-03590-JS

FOUNDATION MEDICINE, INC.

MOTION TO DISQUALIFY ROPES & GRAY LLP AS COUNSEL FOR DEFENDANT



1 representation." Beltran v. Avon Prods., Inc., 867 F. Supp. 2d 1068, 1077 (C.D. Cal. 2012); 2 Farris v. Fireman's Fund Ins. Co., 119 Cal. App. 4th 671, 680, 14 Cal. Rptr. 3d 618, 623 (2004) 3 ("only when such information will be directly in issue or of unusual value in the subsequent 4 matter will it be independently relevant in assessing a substantial relationship") (internal 5 quotations omitted). The burden to demonstrate a substantial relationship lies entirely with 6 Guardant. See In re Charlisse C., 45 Cal.4th 145, 166 n. 11, 84 Cal.Rptr.3d 597, 194 P.3d 330 7 (2008) ("It remains the former client's burden to show the fact of the former representation and 8 the existence of a substantial relationship between the former and current representations"). 9 To demonstrate a substantial relationship, 10 . But that mere fact is not enough to establish 11 the materiality of information gained during the former representation. The former client test is 12 more rigorous than that. 13 14 15 16 17 18 19 The advertising claims at issue in this case concern how accurate the parties' assays are, 20 as measured and assessed in different ways. 21 22 23 24 25 . What 26 matters in this case is how the parties advertise the results of using those black boxes, and 27 whether those advertising claims are truthful and not misleading when compared to data from 28 analytical and clinical validation studies of those assays. ROPES & GRAY LLP OPPOSITION TO PLAINTIFF GUARDANT HEALTH, INC.'S MOTION TO DISQUALIFY ROPES & GRAY LLP AS COUNSEL FOR DEFÉNDANT FOUNDATION MEDICINE, INC.

1	By way of illustration, consider the first example of FMI's allegedly false advertising set
2	forth in Guardant's Complaint. That advertising claim alleges that, based on the results of
3	certain studies, Guardant's product detects cancer-related genomic alterations in only 58% of
4	patients whereas FMI's product detects such alterations in up to 98% of patients. Guardant
5	contends that statement is false, and whether that statement is truthful and non-misleading
6	depends on whether the data in those studies supports the claim, or does not.
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9	Lacking any concrete facts establishing that Ropes possesses Guardant confidential
10	information material to this false advertising case,
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17	Based on such a deficient factual showing "the court should not allow its
18	imagination to run free with a view to hypothesizing conceivable but unlikely situations in
19	which confidential information 'might' have been disclosed which would be relevant to the
20	present suit." Glaxo Grp. Ltd. v. Genentech, Inc., No. SA 10-CV-2764-MRP, 2010 WL
21	11074653, at *3 (C.D. Cal. June 15, 2010).
22	As its primary source of evidence of a substantial relationship Guardant relies on
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27	10
28	[Haley Decl., ¶21]
	ROPES & GRAY LLP OPPOSITION TO PLAINTIFF GUARDANT HEALTH, INC.'S MOTION TO DISQUALIFY ROPES & GRAY LLP AS COUNSEL FOR DEFENDANT FOUNDATION MEDICINE, INC.

Confronted with the dearth of factual and legal similarities between the two matters,
Guardant, not surprisingly, is unable to provide the Court with any example of confidential

Guardant, not surprisingly, is unable to provide the Court with any example of confidential information Ropes received or likely would have received in the that would be material to this false advertising matter. As such, Guardant's position is not supported by the "substantial evidence" needed for this Court to make the drastic decision to disqualify Ropes as FMI's chosen counsel and the Court should deny Guardant's motion to disqualify. See Visa U.S.A., Inc. v. First Data Corp., 241 F. Supp. 2d 1100, 1104 (N.D. Cal. 2003).

# D. Guardant's Disqualification Motion Is Tactically Based And, If Granted, Would Severely Prejudice FMI's Interests.

For the reasons set forth above, no concurrent or successive conflict prevents Ropes from representing FMI in this case. Guardant brought this motion purely for tactical purposes designed to frustrate FMI's ability to defend this case with the counsel of its choice. Nothing speaks to the tactical nature of this motion more clearly than the fact that Guardant waited more than two months after Ropes had disclosed its retention by FMI to Guardant's counsel to file it. And rather than letting the disqualification motion be resolved before getting to the merits of its claims, Guardant filed on the same day its motion for a preliminary injunction and has gone forward with intensive discovery on that motion. This ensures that FMI must have to both

<sup>&</sup>lt;sup>11</sup> Ropes and FMI reserve their rights to contest any claim Guardant may file to recoup its attorneys' fees incurred in bringing this disqualification motion. Such fees are awarded only in cases where the party defending a disqualification motion does so in bad faith, not where, as here, the defending parties have valid arguments as to why no conflicts exist. *See LeapFrog Enterprises*, 2017 WL 2986604, at \*12 (N.D. Cal. Feb. 23, 2017) (declining to award attorney's fees for a motion to disqualify where "the conflict was not clear cut.").

ROPES & GRAY LLP OPPOSITION TO PLAINTIFF GUARDANT HEALTH, INC.'S MOTION TO DISQUALIFY ROPES & GRAY LLP AS COUNSEL FOR DEFENDANT FOUNDATION MEDICINE, INC.

defend its choice of counsel and engage in an important substantive motion for substantial relief. The only reasonable conclusion to be drawn from this seemingly inconsistent behavior is that Guardant does not truly believe that it will be prejudiced by Ropes' continued representation of FMI in this case, and it calls into serious question Guardant's representation to the Court in its September 20, 2017 letter that "resolution of the disqualification issue [by moving up the hearing date] should permit Guardant to engage in discovery on the Motion for Preliminary Injunction without concern that its own lawyers may use its privileged and confidential information to advance the position of its adversary."

But Guardant's decisions certainly will result in prejudice to FMI. It puts FMI in the untenable situation of having to engage in significant discovery and briefing on the preliminary injunction motion and to be in the middle of that discovery and briefing when its counsel of choice, Ropes, could be removed before these tasks have been completed. This would force FMI to retain new counsel, get them up to speed, and have them re-engage in discovery resulting in significant prejudice to FMI. Guardant created this situation by its own actions and should not be permitted to profit by them, even if the Court were to find that there was a successive conflict. *Kelly v. Roker*, No. C 11-05822 JSW, 2012 WL 851558, at \*3 (N.D. Cal. Mar. 13, 2012) ("[I]t is not in the interests of justice to make the 'substantial relationship' rule *so unyielding* as to permit the former client to inexcusably postpone objections without penalty.") (quoting *River W., Inc. v. Nickel*, 188 Cal. App. 3d 1297, 1309, 234 Cal. Rptr. 33, 41 (Ct. App. 1987)) (emphasis in original).

FMI chose Ropes as its counsel in this matter based on Mr. Brody's significant expertise in false advertising cases in the life sciences space. To date, Mr. Brody and his team, none of whom did any work for Guardant, have expended over a thousand hours on the case.

Disqualifying Ropes after all this work has been done, and in the midst of intensive litigation of the preliminary injunction motion, would result in an unfair punishment of the client, FMI, for what would have been solely the actions of its law firm, Ropes. Given that Ropes has an ethical wall in place protecting Guardant's information, the drastic remedy of disqualification should be avoided in this case.

# V. **CONCLUSION** For these reasons, FMI and Ropes respectfully request that the Court deny Guardant's motion to disqualify Ropes as FMI's counsel in this matter. Respectfully submitted, September 29, 2017 By /s/ Eric R. Hubbard Eric R. Hubbard (pro hac vice) Eric.Hubbard@ropesgray.com Gregory M. Reiser (pro hac vice) Gregory.Reiser@ropesgray.com Joseph B. Palmieri Joseph.palmieri@ropesgray.com Attorneys for ROPES & GRAY LLP and Defendant FOUNDATION MEDICINE, INC.

1	CERTIFICATE OF SERVICE
2	I hereby certify that on September 29, 2017, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to all
3	counsel of record.
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5	/s/ Eric R. Hubbard
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